BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE, MATTHEW E. MCMILLAN, CASE NOS. 99-10 & 00-17	:	SC CASE NOS.: 95,886 00-703

JUDICIAL QUALIFICATIONS COMMISSION'S MOTION IN LIMINE TO EXCLUDE STIPULATION DATED JANUARY 17, 2000

The Judicial Qualifications Commission ("JQC"), by and through its undersigned Special Counsel, hereby files its Motion in Limine Regarding Stipulation dated January 17, 2000. As grounds therefor, the JQC states as follows:

INTRODUCTION

1. The JQC'S Notice of Formal Charges in Inquiry No. 99-10 charges Judge McMillan with violations of the Code of Judicial Conduct in eleven separate counts. The principal basis of the Formal Charges is that during the election campaign for the judicial office which he now occupies, Judge (then candidate) McMillan engaged in a pattern of inappropriate conduct in that he: i) made pledges and promises of conduct in office; ii) made statements that committed or appeared to commit or reflect his predisposition to a legal position as to cases, controversies, individuals, or issues that were likely to come before him; iii) made knowingly false or misleading representations concerning his opponent; and iv) otherwise conducted

himself in a manner which was inappropriate under the Code of Judicial Conduct ("Code").

2. The final hearing in this matter was previously scheduled for January 18 - 20, 2000 in Manatee County, Florida. In accordance with Rule 6(j) of the Rules of the Judicial Qualifications Commission, the Investigative Panel of the JQC reached a Stipulation with Judge McMillan on January 17, 2000, thereby obviating the need for the final hearing.[1] A copy of the Stipulation is attached hereto as Exhibit A.

3. In the Stipulation, Judge McMillan admitted to every violation alleged in the Notice of Formal Charges with the exception of: i) Charge No. 5, which the Stipulation dismissed; ii) those portions of the charges predicated on violations of Canon 7(A)(3)(d)(iii) of the Code, which require proof that a candidate "knowingly misrepresent[ed] the identity, qualifications, present position or other fact concerning the candidate or an opponent . . . , " which the Stipulation dismissed; and iii) a portion of Charge No. 3 pertaining to an allegation that Judge McMillan had falsely or misleadingly asserted that the incumbent judge asserted pressure upon the

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[1] Rule 6(j) of the Rules of the Judicial Qualifications Commission specifically provides that:

> The Investigative Panel may reach agreement with a judge on discipline or disability, and such stipulation shall be transmitted directly by it to the Supreme Court to accept, reject, or modify in whole or in part.

Manatee County Sheriff not to support Judge McMillan, which the Stipulation also dismissed.

4. Based on the Stipulation, the Investigative Panel also entered its Findings and Recommendation of Discipline to the Florida Supreme Court in which the Investigative Panel adopted and incorporated by reference the Stipulation. The Investigative Panel recommended the following discipline to the Florida Supreme Court:

1) A public reprimand delivered personally before the supreme court;

2) A six-month suspension without pay;

3) A public apology to the citizens of Manatee County; and;

4) Payment of all court reporters' fees incurred by the Commission.[2]

5. By Order dated June 21, 2000, the Florida Supreme Court rejected the Stipulation, reasoning that "the interests of justice require that the recommended disposition be rejected and [that] th[e] matter be returned to the Commission for further proceedings on the merits of the issues of misconduct as well as the appropriate discipline." A copy of the Order is attached hereto as Exhibit C.

6. In his Supplemental/Amended Witness List and Exhibit List served on October 14, 2000, Judge McMillan has listed the Stipulation as an exhibit he intends

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[2] On January 31, 2000, the Investigative Panel filed *Corrected* Findings and Recommendation of Discipline ("Findings") *nunc pro tunc* to correct typographical errors. A copy of the Findings are attached hereto as Exhibit B.

to introduce at the final hearing in this matter. *See* Supplemental Exhibit List at 26 (no. 274). At the telephonic Prehearing Conference in this matter on October 10, 2000, counsel for Judge McMillan intimated that he intended to offer the Stipulation as an admission by the JQC that it could not prove that Judge (then candidate) McMillan knowingly misrepresented "the identity, qualifications, present position or other fact" concerning himself or his opponent since the JQC had previously dismissed in the Stipulation all charges based upon alleged violations of Canon 7(A)(3)(d)(iii) of the Code (*e.g.* "knowing misrepresentations").

ARGUMENT

Rule 12 of the Judicial Qualifications Commission Rules provides that "[i]n all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules." Rule 14 further provides that "[a]t a hearing before the Hearing Panel, ***legal evidence only*** shall be received and oral evidence shall be taken only under oath." (emphasis added). The Florida Evidence Code, § 90.101, *et seq.*, *Florida Statutes*, in turn, provides that the Evidence Code applies to "civil actions and all other proceedings pending on or brought after October 1, 1981."

Section 90.408, *Florida Statutes*, specifically provides that:

> Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

Id.[3] Relying upon § 90.408, the court in *Mortgage Guarantee Insurance Corp. v. Stewart*, 427 So. 2d 776 (Fla. 3d DCA 1983), reiterated the well-established principle that "settlements or offers of settlement ***have never been considered admissions against interest binding on the parties making them***." *Id.* at 776 (emphasis added). Applying *Stewart's* rationale here, it defies common sense to suggest that the Stipulation between Judge McMillan and the Investigative Panel is admissible for any purpose. This is true not only because of the prohibition codified in § 90.408 excluding evidence of settlement negotiations, but also because the supreme court has rejected the Stipulation.[4] Thus, the Stipulation is void *ab initio* and cannot be offered into evidence by either party.

Judge McMillan's attempt to tie the JQC's hands by contending that the Hearing Panel should be precluded from considering evidence of his "knowing misrepresentations" further underscores the whipsaw effect he attempts to achieve

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[3] In a similar vein, section 90.410, *Florida Statutes*, provides that:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendre; or an offer to plead guilty or nolo contendre to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

Id.

[4] Because of the nature of JQC proceedings, the doctrines of res judicata and collateral estoppel do not apply. *In re Kelly*, 238 So. 2d 565 (Fla. 1970). Thus, even if the JQC had dismissed this entire proceeding and then re-filed it, Judge McMillan could not complain that he was being prosecuted unfairly.

by unilateral use of the Stipulation. Interestingly, although Judge McMillan contends that the Hearing Panel should not be permitted to consider whether he made any "knowing misrepresentations" under Canon 7(A)(3)(d)(iii) of the Code, he has not professed any intention to be equally bound by the admissions he made in the Stipulation that he violated several provisions of the Code.[5]

Lastly, even if the Hearing Panel determines that the Stipulation is admissible notwithstanding § 90.408, it is noteworthy that the Investigative Panel's Corrected Findings and Recommendation of Discipline were based on the record as it then existed. Specifically, in its Findings, the Investigative Panel stated that:

> [T]he Commission cannot find ***on the present record*** that the evidence rises to the requisite level of "clear and convincing" so as to find that Judge McMillan also violated Canon 7(A)(3)(d)(iii) of the Code of Judicial Conduct.

See Findings at 3 (emphasis added). Of course, since that time [January 17, 2000], the record has been developed much further as the parties have been engaged in substantial discovery in preparation for the upcoming hearing. Thus, even if the Investigative Panel's decision to dismiss all charges of "knowing misrepresentations"

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[5] Among other things, Judge McMillan admitted in the Stipulation that during the course of the election campaign for the judgeship he now occupies he engaged in a pattern of improper conduct in that he made pledges and promises of conduct in office; made statements that committed or appeared to commit him or reflect his predisposition to a legal position as to cases, controversies, individuals, or issues that were likely to come before him; made inaccurate or misleading representations concerning his opponent; and otherwise conducted himself in violation of Canon 1, Canon 2(A), Canon 3(b)(2), Canon 3(b)(5), Canon 3(b)(9), Canon 7(A)(3)(a), Canon 7(A)(3)(d)(i) and Canon 7(A)(3)(d)(ii) of the Code of Judicial Conduct.

were admissible into evidence, that fact would not preclude the Hearing Panel from still finding that Judge McMillan made "knowing misrepresentations" inasmuch as the Stipulation was predicated on the record ***as it existed on January 17, 2000***.

CONCLUSION

The Stipulation between Judge McMillan and the Investigative Panel should not be offered into evidence. First, the Stipulation is evidence of settlement negotiations and is, therefore, barred under the Florida Evidence Code. Second, the Stipulation has been rejected by the Florida Supreme Court and is thus void. Even if the Stipulation were admissible, however, its admission would still not preclude the Hearing Panel from finding that Judge McMillan committed "knowing misrepresentations" under Canon 7(A)(3)(d)(iii) because the Investigative Panel entered into the Stipulation and entered its Findings based on the record only as it then existed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **JUDICIAL QUALIFICATIONS COMMISSION'S MOTION IN LIMINE TO EXCLUDE STIPULATION DATED JANUARY 17, 2000** has been furnished by Telecopier to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, 400 S. Monroe, The Historic Capitol, Room 102, Tallahassee, FL 32399-6000; **THOMAS C. MacDONALD, JR., ESQ.**, General Counsel, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; **JOHN R. BERANEK, ESQ.,** Counsel, Hearing Panel, Ausley & McMullen, 227 South Calhoun St., P.O. Box 391, Tallahassee, FL 32301; **HONORABLE MATTHEW E. MCMILLAN**, 3311 46th Plaza East, Bradenton, FL 34203; **ARNOLD D. LEVINE, ESQ.**, Levine, Hirsch, Segall & Brennan, P.A., 100 S. Ashley Dr., Suite 1600, Tampa, FL 33602; and **SCOTT K. TOZIAN, ESQ.**, Smith and Tozian, P.A., 109 N. Brush St., Suite 150, Tampa, FL 33602, this 20th day of October, 2000.

Attorney